



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUN 24 2009

REPLY TO THE ATTENTION OF:

David L. Pippen, Policy Director
Office of the Governor
State House, Room 206
Indianapolis, IN 46204

C-14J

Dear Mr. Pippen:

As you know, applicable federal statutes and regulations require Indiana to maintain an adequate criminal enforcement program under the Clean Air Act, 42 U.S.C. Section 7401 *et seq.*, the Clean Water Act, 33 U.S.C. Section 1251 *et seq.*, the Resource, Conservation and Recovery Act, 42 U.S.C. Section 6901 *et seq.* and the Safe Drinking Water Act, 42 U.S.C. Section 300f, *et seq.* Regulations concerning these provisions are listed at 40 CFR 51.230, 40 CFR 63.91(d), 40 CFR 70.11, 40 CFR 123.27, 40 CFR 271.16 and 40 CFR 142.10(b)(6)(vi), among others. We previously reviewed draft Indiana legislation which attempted to address shortcomings with these federal requirements, and advised you of our comments in a letter dated January 14, 2008.

The legislation we reviewed at that time made substantial changes to existing law, and we appreciate your efforts to address many of our concerns. However, the legislation enacted as P.L. 137-2007 was significantly different from the draft legislation we reviewed, and fails to achieve the minimum standards required by the above regulations. We therefore have continuing concerns about the adequacy of Indiana's criminal enforcement program. In particular:

- Although the new legislation provides for enforcement of air permits, it does not provide a clear mechanism to enforce violations of the underlying air regulations, such as state implementation plans (SIPs), new source performance standards (NSPS) or national emission standards for hazardous air pollutants (NESHAPs). As a result, major program areas such as asbestos violations would not be criminally enforceable, as persons involved in asbestos removals are not required to obtain a permit. While we understand that IC 13-17-3-5 provides for criminal enforcement of *air pollution control laws*, the definition of this phrase does not include IDEM regulations. By contrast, we note that Indiana's civil enforcement provision specifically authorizes enforcement of rules or standards adopted by one of the Boards. See IC 13-30-4-1.

- The new bill does not appear to authorize enforcement for a failure to obtain an air permit. We understand that IDEMs' view is that this authority is contained in IC 13-17-7, but this provision appears to us merely to provide an exemption from liability for those who have submitted a permit application.

- The new legislation provides an inadequate crime addressing unpermitted discharges to waters of the State. At IC 13-18-4-5, the new bill authorizes criminal enforcement of unpermitted discharges only if the discharge "caused or contributed to a polluted condition" of any water. This provision is substantially narrower than required by the EPA delegation regulation.

- The new bill applies criminal sanctions to those "regulated under" specific state statutory provisions relating to air, water and hazardous waste. However, those statutory provisions only authorize IDEM to enact regulations, and do not themselves apply to the regulated community. A defendant may argue that this language fails to provide adequate notice of the intention to apply criminal sanctions to IDEM regulations. We suggest that you clarify this point with Indiana's Attorney General, or alternatively, amend the statute to authorize criminal enforcement of relevant IDEM regulations.

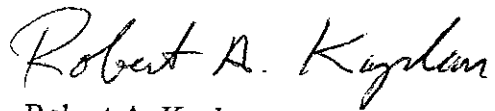
- The new bill requires a court to consider sentencing factors relating to harm "if found by a jury." We assume this phrase was not intended to establish a defendant's right to introduce evidence of lack of harm at trial. We ask that you confirm that this is Indiana's interpretation as well. As you know, one of the issues we identified with the prior statute was the imposition of a defense due to purported lack of environmental harm, and the added burden of proof this would place on all prosecutions.

- The water crimes in the new legislation apply to those who "willfully" or "recklessly" violate water laws. The Clean Water Act was amended in 1987 to provide crimes for negligent and knowing violations. The *mens rea* terms in the federal statute are each broader in application than the terms in the new state legislation, and we recommend the federal statutory terms be adopted (note that the federal standard for criminal negligence is simple negligence under federal caselaw).

The obligation to maintain adequate state criminal enforcement statutory authority is a condition of U.S. EPA's grant of authority under the federal environmental statutes listed above. We will be evaluating the steps U.S. EPA needs to take if these issues cannot be

resolved. We hope that Indiana will amend the statute to address these problems, and look forward to working with you to resolve our concerns.

Sincerely yours,

A handwritten signature in cursive script that reads "Robert A. Kaplan". The signature is written in dark ink and is positioned above the printed name and title.

Robert A. Kaplan
Regional Counsel